NO. 89-226

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARY ANN TOLLIVER and PAUL FELIX,
Petitioners

versus

DR. CHARLES B. ODOM, JR.,
Respondent,

DR. ROBERT B. THOMPSON,
Respondent,

PARISH OF LAFAYETTE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ELWOOD C. STEVENS, JR.
Kleinpeter, Schwartzberg & Stevens
Post Office Box 2626
Morgan City, Louisiana 70381
Telephone: (504) 384-8611
ATTORNEY FOR PETITIONERS

CARY J. MENARD
Post Office Box 4321
Lafayette, Louisiana 70508
Telephone: (318) 237-7900
ATTORNEY FOR PETITIONERS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that unauthorized mutilation upon the body of a dead infant by a deputy coroner acting under color of state law does not violate a fundamental liberty or privacy right of the surviving parents, guaranteed by the Due Process Clause of the Fourteenth Amendment.

LIST OF INTERESTED PARTIES

1. Mary Ann Tolliver - Plaintiff/Petitioner
2. Paul Felix - Plaintiff/Petitioner
3. Parish of Lafayette - Defendant/Respondent
4. Dr. Robert B. Thompson - Defendant/Respondent
5. Dr. Charles B. Odom, Jr. - Defendant/Respondent

TABLE OF CONTENTS

PAGE

Questions Presented for Review i
List of Interested Parties ii
Table of Contents iii
Table of Authorities v
Opinions Below 2
Statement of Jurisdiction 2
Statutory Provisions Involved 2
Statement of the Case 2
Argument 6

I. The United States Court of Appeals for the Fifth Circuit erred in holding that unauthorized mutilation upon the body of a dead infant by a deputy coroner acting under color of state law does not violate a fundamental liberty or privacy right of the surviving parents, guaranteed by the Due Process Clause of the Fourteenth Amendment 6

Conclusion 19
Certificate of Service 20

Appendix:

A Order of the United States Supreme Court, July 11, 1989 . . . . . A-1
B Opinion of the Court of Appeals for the Fifth Circuit, April 19, 1989 . . . . . A-2
C Ruling of the District Court, December 11, 1987 . . . . . A-19
D Minute Entry of the District Court, December 16, 1987 . . . . . A-27
E Ruling of the District Court, January 5, 1988 . . . . . A-28

F Ruling of the District Court, January 5, 1988 ..... A-31

G Letter of Dr. Robert Thompson to Hon. Nathan Stansbury, February 24, 1987 ..... A-33

H Excerpts, Deposition of Dr. Charles Odom A-36

TABLE OF AUTHORITIES

CASES: Page

Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975) 10

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) 10

Cleveland Board of Education v. Lafleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) 11

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 15

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed. 2d 668 (1986) 15

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) 8

Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984) 9

Georgia Lions Eye Bank v. Lavant, 335 S.E.2d 127 (Ga. 1985) 9

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 7,8,12

Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973) 14

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967) 8

McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) (en banc) 16

Meyer v. Nebraska, 262 U.S. 390 (1923) 7,8,10,11

Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) 11

Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937) 7-8

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 420 (1981) 6-7,15,16

TABLE OF AUTHORITIES (continued)

CASES: **Page**

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 13

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 8,10

Plante v. Gonzales, 575 F.2d 1119, *rehearing denied*, 580 F.2d 1052 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) 13

Prince v. Massachusets, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) 8,11,12

Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct.3244, 82 L.Ed.2d 462 (1984) 18

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205,96 L.Ed. 183 (1952) 14,15

Roe v. Conn, 417 F.Supp. 769 M.D. Ala.,1976) 11

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 8

Shillingford v. Holmes, 634 F.2d 263, (5th Cir. 1981) 14

Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) 8

Sotto v. Wainwright, 601 F.2d 184, *rehearing denied*, 604 F.2d 671 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). 8

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). 12

Thibodeaux v. Bordelon, 740 F.2d 329, (5th Cir. 1984). 7

Trujillo v. Board of City Commissioners, 768 F.2d 1186 (10th Cir. 1985). 15,16

Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). 13

TABLE OF AUTHORITIES (continued)

CASES: **Page**

White v. Rochford, 592 F.2d 381, (7th Cir. 1979). 10,14

Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). 8

STATUTES

42 U.S.C. Sect. 1983 2,6,17

U.S. Const. Amend. 1, 3, 4, 5, 14 . . . . . *passim*

La. R.S. 33: 1563(c) 3

BOOKS

W.L. Prosser and W.P. Keeton, *Prosser and Keaton on Torts*, p.63 (5th ed. 1984). 10

Bonet-Maury, "Commemoration of the Dead", 3 Encyclopedia of Religion and Ethics 716 (Hastings ed. 1910) 15

Hartland, "Death and the Disposal of the Dead", 4 Encyclopedia of Religion and Ethics 411 (Hastings ed. 1911) 15

ARTICLES

Note, "Developments in the Law -- Constitution and the Family", 93 Harv.L.Rev. 1156, (1980) 11

Quay, "Utilizing the Bodies of the Dead", 28 S. Louis U.L.J. 889, (1984) 12

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioners, Mary Ann Tolliver and Paul Felix, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered April 19, 1989.

OPINIONS BELOW

The Court of Appeals rendered its opinion on April 19, 1989 (App. at ____, infr.) The opinion is reported at 870 F.2d 304 (5th Cir. 1989).

The district court delivered its ruling on January 5, 1988 (App. at ____, infra.).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals (App. at ____, *infra.*) was entered on April 19, 1989. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sect. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. Sect. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

This case arose as the result of events which occurred on or about October 18, 1986, in the Parish of Lafayette, State of Louisiana, where the Petitioners reside. On this date, between 2:00 a.m. and the early morning hours, Petitioners' infant son, Kendall Paul Francis (Felix), died of Sudden Infant Death Syndrome (SIDS), more commonly

known as "crib death". As is mandated by La. R.S. 33:1563(c), local authorities secured the infant's body and promptly delivered it to the parish coroner's office for a required medical autopsy.[1]

On January 6, 1987, Gary McBroom, an employee of the Lafayette Parish Coroner's Office, provided Dr. Robert Thompson, the Lafayette Parish Coroner, with a written statement detailing his personal knowledge of the events giving rise to this action. According to Mr. McBroom, in early October of 1986, during a coffee break, he was told by Respondent, Dr. Charles Odom, (hereinafter "Dr. Odom"), a forensic pathologist and a Deputy Coroner of Lafayette Parish, of the latter's intention to perform "dropping" experiments on future SIDS fatalities. Dr. Odom explained that he wanted to gather information to be used in connection with a legal proceeding in Hawaii in which he was to be called as an expert witness.[2] On Saturday, October 18, 1986, pursuant to Dr. Odom's previously announced plan, Mr. McBroom was called on to assist Dr. Odom with an autopsy. The subject of this procedure was the infant child of the Petitioners.

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[1] Sect. 1563. Duty to hold autopsies, investigations, etc.

c. (1)(a) The coroner shall perform or cause to be performed by a competent physician an autopsy in all cases of infants under the age of one year who die unexpectedly without explanation.

(4) The coroner shall not perform an autopsy if the parents of the infant provide to the coroner their objection in writing, *unless* the coroner finds that the facts surrounding the death require that an autopsy be performed in the interest of public safety, public health, or public welfare. (emphasis added).

[2] Prior to taking a position with the Lafayette Coroner's office, Dr. Odom had been Chief Medical Examiner of the City of Honolulu, and was to testify as an expert witness in a homicide case arising from the death of an infant who was allegedly "accidentally dropped" from his father's shoulder.

Mr. McBroom initially assisted Dr. Odom in an external examination of the child's body to first determine if any traumatic injuries were present. When Dr. Odom was satisfied that no evidence of trauma existed, x-ray pictures of the infant's skull were taken. This having been accomplished, Dr. Odom took the child's body to the rear entrance of the morgue and holding the child by the feet, dropped him head first onto a flat, concrete driveway from a height of approximately one meter. More x-rays were then taken, presumably to determine the extent of skull and/or brain damage resulting from the impact.

After the experiment was completed, the state-mandated autopsy was conducted. The findings and conclusions of Dr. Odom's experiment were then dictated and transcribed separately from the normal autopsy findings. Mr. McBroom reported that at this point, Dr. Odom remarked that additional experiments would be necessary to statistically substantiate his findings.

In addition to Mr. McBroom, John Jacobson, the Chief Forensic Investigator for the Parish of Lafayette, also provided Dr. Thompson with a written statement, on January 8, 1987, stating that in early October of 1986 he had become aware of Dr. Odom's intent to perform "dropping" experiments on deceased infants. Dr. Odom had likewise informed Mr. Jacobson of his plans while the two were having coffee. On October 20, 1986, Mr. Jacobson was apprised, by Mr. McBroom, of the October 18th experiment.

On December 26, 1986, Mr. Jacobson went to the home of Dr. Thompson and revealed his knowledge of two "dropping" experiments performed by Dr. Odom: the October 18th experiment on Kendall Paul Francis (Felix), and a subsequent experiment on a second infant. Within an hour of this visit, Dr. Thompson advised Dr. Odom by writ-

ten notice that he was suspended from performance of any autopsies. On January 5, 1987, Dr. Thompson notified Dr. Odom by letter that he was officially relieved of all duties and that he was to vacate his office at the Lafayette Parish Forensic Laboratory, and return all keys and property belonging to the coroner's office.

In a letter dated February 24, 1987, Dr. Thompson informed the District Attorney for the 15th Judicial District of Louisiana of Dr. Odom's "dropping" experiments and recommended criminal prosecution. Dr. Thompson stated that the forensic laboratory was established for the sole purpose of determining cause of death, that the experiments were conducted without parental consent and could in no way be explained as part of a legal autopsy, but rather "detracted from the integrity of a legitimate post-mortem examination". (App. at ____, infra). The letter went on to state that the autopsy reports submitted to Dr. Thompson by Dr. Odom made no mention of these experiments. Dr. Thompson concluded by remarking that he personally considered such experiments "highly unprofessional, repulsive and debasing", (App. at ____, infra), and in his opinion, constituted mutilation of human remains and hence, a violation of the law.

The Lafayette Parish Coroner's Office returned the body of Kendall Paul Francis (Felix) to the petitioners on October 21, 1986. Petitioners immediately observed severe but unexplained disfigurement to their child's head (see App. at ____, *infra*). The pain and anguish resulting from Dr. Odom's intentional acts was exacerbated by the fact that Petitioner, Mary Ann Tolliver, was already experiencing mental and emotional suffering due to her son's death and was already participating in a SIDS support program when she was finally informed of Dr. Odom's conduct by

the Coroner's office in late February of 1987, approximately four months after the fact.

Petitioners filed suit under 42 U.S.C. Sect. 1983 on October 5, 1987 against Dr. Odom, Dr. Thompson and the Parish of Lafayette, alleging that Dr. Odom, while employed as a deputy coroner in the Lafayette Parish Coroner's Office, performed unauthorized mutilation upon the body of their dead child in violation of the Fourteenth Amendment. On January 5, 1988, the United States District Court for the Western District of Louisiana dismissed Petitioners' claims, holding that Petitioners did not state a Constitutional deprivation for which relief could be granted under 42 U.S.C. Sect. 1983. The Court of Appeals for the Fifth Circuit affirmed the ruling of the District Court on April 19, 1989.

ARGUMENT

1. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN HOLDING THAT UNAUTHORIZED MUTILATION UPON THE BODY OF A DEAD INFANT BY A DEPUTY CORONER ACTING UNDER COLOR OF STATE LAW DOES NOT VIOLATE A FUNDAMENTAL LIBERTY OR PRIVACY RIGHT OF THE SURVIVING PARENTS, GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In affirming the District Court's holding that Petitioners did not state a Constitutional deprivation on which suit under 42 U.S.C. Sect. 1983 could be premised, the Court of Appeals correctly noted that the doctrine of *Par-*

ratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 420 (1981), regarding the availability of state-created post-deprivation tort remedies to Section 1983 claimants, has no bearing on substantive due process claims. See *Thibodeaux v. Bordelon,* 740 F.2d 329, 333 (5th Cir. 1984). The Court then went on to reject Petitioners' claim of a substantive due process violation stating that it could "discern no precedent in the relevant jurisprudence which would warrant such an extension of the liberty or privacy rights derived from and protected by the Due Process Clause of the Constitution". (App. at A-____, *infra*). Because the Court of Appeals has decided this important Constitutional question in a manner inconsistent with applicable precedents of this Court, and because the specific question presented by the instant case has not been, but should be definitively resolved by this Court, Petitioners respectfully request that this Honorable Court issue a Writ of Certiorari to review the Fifth Circuit's ruling.

Although not explicitly written in the Constitution, it is well settled that a right of privacy, or rather certain "zones" of privacy within which individuals may make decisions about aspects of their private lives, without state interference, are indeed protected by the Constitution. These "zones" of privacy are based upon the First, Third, Fourth and Fifth Amendments to the U.S. Constitution, and on the penumbra of rights guaranteed by the Bill of Rights, *Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d (1965), as well as the concept of liberty guaranteed by Section 1 of the Fourteenth Amendment, *Meyer v. Nebraska,* 262 U.S. 390 (1923). This Court has made it very clear that only those personal immunities deemed "fundamental" or "implicit in the concept of ordered liberty" are to be protected against state transgression by the Due Process Clause. *Palko v. Connecticut,*

302 U.S. 319,325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

A review of this Court's jurisprudence in the privacy context reveals that historically, privacy rights have arisen from concerns regarding the proper role of government in both marriage and family relationships. Aspects of the right of privacy have been found in activities pertaining to marriage, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed2d 618 (1978); contraception, *Griswold v. Connecticut*, supra, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); family relationships, *Prince v. Massachusets* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); abortion, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, supra. In summary, this Court has consistently held that in the context of marriage and family, individuals have the right to decide: 1) who to marry; 2) whether or not to have children; 3) whether or not to abort a pregnancy during a specified time; and 4) what sort of education and cultural background their children will be exposed to. Absent some form of abuse or the existence of a compelling state interest in regulation, these rights are absolute. *Sotto v. Wainwright*, 601 F.2d 184, rehearing denied, 604 F.2d 671 (5th Cir., 1979), cert. denied, 445 U.S. 950 (1980). Given this set of fundamental rights, which govern the relationships between parent, child and state, it is inconsistent for the Court of Appeals to recognize that parents have a right of privacy or familial integrity in the care and custody of their living children, but do not have a similar right to determine the disposition of the bodies of their dead children, free of state-occasioned mutilation. Considering the emotional, non-corporeal interests which are protected by the

"liberty" concept of the Fourteenth Amendment, intentional, state-occasioned mutilation to the body of a parent's child clearly infringes upon an interest which is no less "fundamental" because the child is now deceased. In other words, state-occasioned mutilation of the sort involved in the case at bar transgresses against interests which are intimately associated with parental peace-of-mind. This peace-of-mind does not cease with the death of the child.

In brief before the Court of Appeals, Dr. Odom argued that at most, petitioners have a state-created property right in the body of their child. In support of this position, Dr. Odom offered *Fuller v. Marx* 724 F.2d 717 (8th Cir., 1984). *Fuller* held that next-of-kin have property or "quasi-property" rights which entitle them to possession and control of the relative's body for the purpose of a decent burial. In the instant case, the Court of Appeals reasoned that since most states, including Louisiana, grant such "property" rights to next-of-kin, injuries relating to corpses are adequately remedied by state law (App. at ____, *infra*).

Petitioners submit that "quasi-property" rights are nothing more than an artificial jurisprudentially created facade and provide inadequate relief in situations such as the case at bar. In *Georgia Lions Eye Bank v. Lavant,* 335 S.E.2d 127 (Ga. 1985), the Georgia Supreme Court reviewed the history of burial practices and noted that at common law, no property right in corpses existed since matters concerning the disposition of dead bodies were left to ecclesiastical courts. Because ecclesiastical courts do not exist in this country, our courts created the notion of "quasi-property" rights to describe the interests of next-of-kin in the bodies of deceased relatives. *Georgia Lions Eye Bank v. Lavant,* 335 S.E.2d at 128. Dean Prosser, discussing

"quasi-property" rights noted that "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the *personal feelings* of the survivors are being protected, under a fiction likely to deceive no one but a lawyer". W. L. Prosser and W.P. Keeton, *Prosser and Keaton on Torts*, p. 63 (5th ed. 1984) (emphasis added). Petitioners assert that no property right has been damaged by Dr. Odom's intentional mutilation; it would be frivolous to suggest that Kendall Francis' body is property to be bought and sold like any other corporeal possession. The actual interest which has been infringed upon is the fundamental right of parents to dispose of their child's body without it first being subjected to intentional, state-occasioned mutilation. It is an interest, like all privacy interests, which protects *emotional*, as well as physical, well-being. In the last decade both this Court and other federal courts have held that emotional well-being is protected by the Due Process Clause. *Carey v. Piphus*, 435 U.S. 247, 258-59, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979).

The right of family integrity is well established in the jurisprudence of this Court, having evolved under both the "liberty" concept of the Fourteenth Amendment and the doctrine of privacy. In *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. IA, 1975), a United States District Court in Iowa reviewed the line of cases decided by this Court which dealt with familial rights in the "liberty" context, and concluded that a fundamental right to family integrity is indeed protected by the Fourteenth Amendment. *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. at 15. The District Court found precedent for this right in *Meyer v. Nebraska*, supra (right to marry); *Pierce v. Society of Sisters*, supra (right of parents to direct rearing and education of children); and in *Prince v. Massachusetts*, supra, where this Court declared:

> "It is cardinal among us that the custody, care and nurture of the child reside first in the parents. . . .and it is in recognition of this that these decisions (*Meyer* and *Prince)* have respected the private realm of family life which the state cannot enter." 321 U.S. at 166, 46 S.Ct. at 442.

The right of family integrity was again upheld in *Roe v. Conn* 417 F.Supp. 769 (*M.D. Ala.*, 1976) where the Court stated that "the Constitution recognizes as fundamental the right of family integrity". 417 F.Supp. at 777.

Petitioners respectfully submit that the right of parents to dispose of their child's body, free of intentional, state-occasioned mutilation, is both an integral, logical and fundamental aspect of the right of family integrity. In *Cleveland Board of Education v. Lafleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), this Court held that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by Fourteenth Amendment due process". 414 U.S. at 639-640, 94 S.Ct. at 796, 39 L.Ed.2d at 52. It is entirely logical that the Constitution protects family integrity because the institution of the family is "deeply rooted in this Nation's history and tradition". *Moore v. City of East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977). Along these same lines, a recent issue of the *Harvard Law Review* noted that:

> 'In the family cases, the Court has consistently turned to tradition as a source of previously unrecognized aspects of the liberty protected by the due process clauses. Recourse to traditional values enables the Court to afford constitutional protection to *rights Americans have assumed to be part of our nation's scheme of liberty.*"

Note: "Developments in the Law — the Constitution and the Family", 93 Harv.L.Rev. 1156, 1177 (1980). (emphasis added).

Although there is no way of knowing the exact status of traditional values in this nation, Petitioners sincerely believe and respectfully suggest that the right of parents to dispose of their children's bodies, free of unauthorized state-occasioned "medical experimentation" is a right which the vast majority of Americans would consider basic, fundamental and "part of our nation's scheme of liberty". As Father Quay, S.J., eloquently explains:

> "The treatment to be accorded to a corpse is, then, of exceptional importance to humanity at large. The deepest roots of the unconscious are touched by what is done or permitted to be done with human remains. It is from these roots that all funeral customs have grown, and it was to accomodate these customs that our early law concerning the treatment of corpses developed."

Quay, "Utlizing the Bodies of the Dead", 28 S. Louis U.L.J. 889, 904 (1984).

Surely, the right to bury one's child free of intentional, state-occasioned mutilation is at least as fundamental as the right to have the same child instructed in German while still alive. See *Prince v. Society of Sisters,* supra.

As noted earlier, in addition to the "liberty" concept of the Fourteenth Amendment, this Court has also protected family integrity under the privacy doctrine. See *Griswold v. Connecticut,* supra; *Eisenstadt v. Baird,* supra; *Roe v. Wade,* supra. In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), this Court struck down

an Illinois law which deprived an unmarried father of the care and custody of his natural children upon the death of their mother. In declaring the state law unconstitutional this Court held that the right of family integrity is protected under the privacy doctrine of the Fourteenth Amendment. *Stanley v. Illinois,* 405 U.S. at 651, 92 S.Ct. at 1208.

The doctrine of privacy was again elaborated upon by this Court in *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The *Whalen* Court observed that:

> "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in *independence in making certain kinds of important decisions.* (emphasis added). 429 U.S. at 598-600, 97 S.Ct. at 876.

This Court has recognized that the second, or "autonomy"branch of privacy includes "matters relating to marriage, procreation, contraception, family relationships and child rearing and education". *Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405. See also *Plante v. Gonzales,* 575 F.2d 1119, 1128, rehearing denied, 580 F.2d 1052 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979). Petitioners now ask this Honorable Court to consider whether *any* familial right could be more intensely private or entitled to more autonomy than the right of parents to decide how their child's body will be laid to rest. To permit state-employed medical examiners to perform unauthorized "medical experiments", with minimal state tort remedies as the only sanction against such practices, is no less outrageous than a law which would arbitrarily require all bodies to be buried at sea.

In *White v. Rochford*, supra, the Seventh Circuit explained that bue process protection has two aspects: 1) individual, substantive protections, such as privacy rights; and 2) prohibition against state actions which "shock the conscience", see *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 96 L.Ed. 183 (1952) or run counter to fundamental notions of fairness. *White v. Rochford*, 592 F.2d at 385. While the *Rochin* "shocks the conscience" test is not a bright-line formula, "it at least points the way". *Johnson v. Glick* 481 F.2d 1028, 1933 (2nd Cir. 1973). The *Rochin* cause of action usually arises in cases of police misconduct which infringes upon the right of bodily integrity, a right protected by the Fourteenth Amendment. See *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir., 1981). Petitioners submit, however, that the *Rochin* standard, which regulates police misconduct, should also extend to intentional, unauthorized actions of state-employed medical examiners. Dr. Odom's intentional mutilation of Kendall Francis' body without the consent or knowledge of his parents infringed upon the child's bodily integrity in such a way as to shock the public conscience, thereby causing severe and permanent emotional injury to Petitioners, and giving rise to a cause of action under the *Rochin* doctrine.

Dr. Odom argued in brief before the Fifth Circuit that unauthorized tampering with a corpse does not "shock the conscience". See App. at ____, *infra*. Dr. Odom's primary point seemed to be that unauthorized medical experimentation on infant bodies shocks no one's conscience since we live in a world "where horrific crimes are committed daily, populations of whole continents cannot speak their minds without justified fear of imprisonment, and millions go to bed hungry". App. at ____, *infra*. If we define "conscience-shocking" in terms of the broad list of general horribles documented by Dr. Odom on appeal, it is doubtful whether any state action could *ever* rise to the level of a

"conscience-shocking" Constitutional violation. Petitioners respectfully assert that in light of the traditional, reverential treatment accorded human remains, Dr. Odom's intentional mutilation of Kendall Francis' body not only "shocks the conscience" but is also "offensive to human dignity" and therefore violates the Fourteenth Amendment. See Hartland, "Death and the Disposal of the Dead", 4 Encyclopedia of Religion and Ethics 411 (Hastings ed. 1911); Bonet-Maury, "Commemoration of the Dead", 3 Encyclopedia of Religion and Ethics 716 (Hastings ed. 1910); *Rochin v California*, 342 U.S. at 174, 72 S.Ct. at 205.

On appeal, Dr. Odom asserted that a Constitutional right of parents to control the disposition of their children's bodies, free of state-occasioned mutilation, was unfeasible since such a right would be of limitless ambit. Dr. Odom argued that endowing any interest in a dead body with substantive due process protection could mean that pathologists might no longer perform certain autopsy procedures, despite statutory authorization. Dr. Odom's brief also implied that if the aforementioned familial right was recognized by the federal courts, *any* unauthorized tampering with a body would be a Constitutional violation.

Petitioners suggest that Dr. Odom's dissection of the right of family integrity takes the scope of such protection to an exaggerated extreme. Petitioners do not suggest that family rights, or any Fourteenth Amendments right, should be held violated by every act of negligence on the part of state officials. Rather, Petitioners urge that this Court adopt the reasoning of *Trujillo v. Board of City Commissioners*, 768 F.2d 1186 (10th Cir., 1985). Following the decisions of this Court in *Parratt v. Taylor*, supra, *Daniels v. Williams*, 474 U.S. 327, 106 St.Ct. 662, 88 L.Ed.2d 662 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 688 (1986), some confusion has existed in the federal circuits regarding what state-of-mind must be

demonstrated in order to show a violation of due process and, hence, a valid claim under Section 1983. In *Trujillo,* the Tenth Circuit pointed out that while Section 1983 has never been held to require a specific state-of-mind for actionability, see *Parratt v. Taylor,* 451 U.S. 534, 101 S.Ct. at 1912, 68 L.Ed.2d 420 (1981), courts must nonetheless investigate the nature of the asserted Constitutional right in order to determine whether a specific state-of-mind is required to show a deprivation of that right. *Trujillo v. Board of City Commissioners,* 768 F.2d at 1189, citing *McKay v. Hammock,* 730 F.2d 1367, 1373 (10th Cir. 1984) (en banc). The Court noted that equal protection deprivations require proof of discriminatory intent, Eighth Amendment violations require a showing of deliberate indifference, and some First Amendment deprivations must demonstrate that the state intended to obstruct an individual's protected speech or association. *Trujillo v. Board of City Commissioners,* 768 F.2d at 1189. The *Trujillo* Court went on to hold that an allegation of intent is required to allege a deprivation of associational rights under Section 1983. The court explained that anything less than a showing of intent would permit Section 1983 claims for Constitutional rights deprived by the mere negligence of state officials, "a result expressly disapproved in *Parratt*". *Trujillo v. Board of City Commissioners,* 768 F.2d at 1190. Petitioners suggest that even if an allegation of intent were to be required in order to state a claim under Section 1983 for deprivation of the right of parents to dispose of their children's bodies, free of state-occasioned mutilation, the facts of the instant case clearly demonstrate that this test has been satisfied.

In his deposition on December 7, 1987, Dr. Odom unequivocally characterized his questioned conduct as "intentional". App. at ____, *infra.* In response to a question regarding whether he felt his "experiments" to be consistent with state policy and procedure, Dr. Odom replied that

he considered his conduct not only to be consistent with state policy, but also "a desirable thing to do". App. at ____, *infra*. Dr. Odom stated that "the law of the State of Louisiana gave me the authority to conduct these studies", and defined the scope of his duties as follows:

> "State law mandated that I do an autopsy, number one. The state law also said that I could do *whatever studies were necessary* in order to gather data, information, for presentation to a court of law or to a grand jury. (emphasis added.) App. at ____, *infra*.

Dr. Odom may have been "gathering data" but it had absolutely nothing to do with the cause of death of Petitioners' child. One need only consider Dr. Odom's own statements in order to realize that Petitioners, and all other parents, deserve Constitutional protection in cases such as the one at bar. It is obvious that Dr. Odom feels that medical examiners may do whatever they wish with bodies in their custody so long as their tampering fulfills some "data gathering" purpose. The logical result of such a belief, if accepted by even the smallest percentage of medical examiners, should shock all of us.

Burying one's child is an event which is both tragic and intensely private. It would be reprehensible if intentional mutilation of the sort to which Dr. Odom admits is redressed only by woefully inadequate state-tort remedies. Petitioners do not deserve to have such highly private events as their child's burial indecently interrupted by the type of intentional misconduct perpetrated by Dr. Odom. Both Petitioners and society at large do deserve the enforcement of the punitive and prophylactic sanctions provided by 42 U.S.C. Sect. 1983. As this Honorable Court has repeatedly observed:

"Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguised by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation and *seclusion from others in critical aspects of the relationship*" *(emphasis added). Roberts v. United States Jaycees,* 468 U.S. 609, 619-620; 104 S. Ct. 3244, 3250, 82 L.Ed.2d 462 (1984).

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted by:

KLEINPETER, SCHWARTZBERG
& STEVENS

Elwood C. Stevens, Jr.
Post Office Box 2626
Morgan City, Louisiana 70381
Telephone: (504) 384-8611
ATTORNEY FOR PETITIONERS

Cary J. Menard
Post Office Box 4321
Lafayette, Louisiana 70508
Telephone: (318) 237-7900
ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage pre-paid and properly addressed, this the 4th day of August, 1989.

Elwood C. Stevens, Jr

CC: JAMES R. SHELTON
PUGH & BOUDREAUX
P. O. DRAWER 53388
LAFAYETTE, LA. 70505-3388

RICHARD J. PETRE
ONEBANE, DONOHOE, BERNARD, TORIAN, DIAZ, MCNAMARA & ABELL
P. O. DRAWER 3507
LAFAYETTE, LA. 70502-3507

APPENDIX A

Supreme Court of the United States

NO. A-16

Mary Ann Tolliver and Paul Felix,
Petitioners

v.

Charles B. Odom, Jr., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including *August 7*, 1989.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this *11th*
day of July, 1989.

APPENDIX B

Dwayne ARNAUD and Ellen Arnaud,
Plaintiffs-Appellants,

v.

Charles B. ODOM, Jr.,
Defendant-Appellee.

Mary Ann TOLLIVER and Paul Felix,
Plaintiffs-Appellants,

v.

Charles B. ODOM, Jr. and Robert B. Thompson, Defendants-Appellees.

Nos. 88-4053, 88-4099.

United States Court of Appeals,
Fifth Circuit.

April 19, 1989.

Parents of two deceased infant children asserted deprivations by State of constitutional property and liberty interests in bodies of their dead children under federal civil rights statute based on deputy coroner's performing unauthorized medical experimentation on the bodies. The United States District Court for the Western District of Louisiana, John M. Shaw, J., dismissed the claims of both sets of parents for failure to state a claim upon which relief could be granted, and parents appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) adequate state postdeprivation process was available to remedy injuries asserted by parents who claimed violation of procedural due process rights, with respect to quasi-property right of

survivors and remains of deceased relatives provided by Louisiana law and with respect to any deprivation of liberty interests possessed by parents in body and their child; (2) availability of state postdeprivation tort claims to parents was not relevant to claim of substantive due process violation; but (3) substantive due process did not include protection of liberty or privacy interests to be free from state-occasioned mutilation to body of deceased relative.

Affirmed and modified.

J. Minos Simon, Lafayette, La., for Dwayne and Ellen Arnaud.

Elwood Clement Stevens, Kleinpeter, Schwartzberg & Stevens, Morgan City, La., for Mary Ann Tolliver and Paul Felix.

Timothy J. McNamara, Richard J. Petre, Jr., Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, La., for Charles B. Odom, Jr.

James R. Shelton, Lafayette, La., for Thompson.

Appeals from the United States District Court for the Western District of Louisiana.

Before BROWN, JOHNSON, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:

In the instant two appeals, the plaintiff parents of two deceased infant children assert deprivations by the State of Louisiana of constitutional property and liberty

interests in the bodies of their dead children pursuant to 42 U.S.C. § 1983. The district court dismissed the claims of both the parents of Christina Arnaud and the parents of Kendall Felix for failure to state a claim upon which relief may be granted pursuant to Fed.R.Civ.P. 12(b)(6). Persuaded that available state post-deprivation remedies exist which satisfy constitutional procedural due process concerns for any deprivations of property or liberty interests suffered by the parents in the instant appeals, we affirm the district court. Further, in so affirming, we decline to create from the substantive parameters of the due process clause a liberty interest in next of kin to be free from state-occasioned mutilation of the body of a deceased relative and to possess the body for burial in the same condition in which death left the body.

1. FACTS AND PROCEDURAL HISTORY

The instant appeals stem from a tragic and disturbing sequence of events beginning in October and December of 1986 with the deaths of two infants, Kendall Felix and Christina Arnaud, in their sleep from Sudden Infant Death Syndrome (S.I.D.S.), commonly referred to as crib death. Pursuant to Louisiana law, when an infant under the age of one year dies unexpectedly and without explanation, local authorities are required to secure the corpse of the infant for a mandatory autopsy. La.Rev.Stat.Ann. § 33:1563(C) (West 1988). Accordingly, immediately following their deaths from S.I.D.S. the bodies of Kendall and Christina were delivered to defendant Dr. Charles Odom, the Deputy Coroner of the Parish of Lafayette, Louisiana, so that Dr. Odom could perform the mandatory autopsies on the bodies of the infants.

At this point, some background information regarding Dr. Odom is necessary to fully understand the subse-

quent actions of Dr. Odom in performing the autopsies on Kendall and Christian. Dr. Odom, prior to serving as Deputy Coroner for Lafayette Parish, served as the Chief Medical Examiner for the City and County of Honolulu, Hawaii. In his capacity as Chief Medical Examiner in Honolulu, Dr. Odom performed an autopsy on the corpse of an infant reportedly dropped on his head by his father. After conducting the autopsy, Dr. Odom concluded that the father accidently dropped the infant on his head; however, another forensic pathologist determined that the infant died of intentional abuse. As a result of this disagreement between the pathologists on the cause of the death of the infant, Hawaiian authorities commenced a grand jury investigation to ascertain the actual cause of death of the infant—accidental dropping or intentional abuse. In this connection, Dr. Odom anticipated providing expert testimony to the grand jury relating to whether a fall by an infant from a height of one meter, while causing no external injuries, is sufficient to cause a fracture of the skull.

Prior to providing the above testimony in the Hawaii criminal investigation, however, Dr. Odom assumed the position of Deputy Coroner of Lafayette Parish. It was in his position as Deputy Coroner of Lafayette Parish that Dr. Odom, in an effort to gather empirical data to support his expert opinion at the grand jury proceedings in Hawaii, performed the grisly controlled experiments on the bodies of Kendall Felix and Christina Arnaud following their deaths from S.I.D.S. which form the basis of the instant appeals. These experiments conducted by Dr. Odom consisted of taking the corpse of the infant to the rear of the laboratory and, holding the corpse by the feet, dropping the corpse head-first from a predetermined height of one meter onto a surface of virtually smooth concrete. Dr. Odom would then x-ray the skull of the infant and record

the results. Thereafter, Dr. Odom performed the mandatory autopsy.

The above experiments on the bodies of Kendall and Christina were not conducted simultaneously, but were performed in October and December of 1986 respectively following the deaths of the infants. The final of the two experiments conducted by Dr. Odom occurred on December 22, 1986, on the body of Christina Arnaud. In both the instance of Kendall and Christina, the body of the infant was returned to the parents promptly following the experiment and autopsy procedure. Apparently, the parents, while noticing the disfigurement in the bodies of the children resulting from Dr. Odom's experiments, did not immediatley become aware of the deviant actions of Dr. Odom.

Four days after Dr. Odom conducted his experiment on the corpse of Christina, on December 26, 1986, an employee of the Lafayette Parish Coroner's Office informed the Coroner of Lafayette Parish, Dr. Robert Thompson, of the experiments by Dr. Odom on the bodies of the infants. Immediately upon learning of this aberrant behavior by Dr. Odom, Dr. Thompson suspended Dr. Odom from his duties as Deputy Coroner and further instructed Dr. Odom to vacate his office at the Lafayette Parish Forensic Laboratory. Dr. Thompson subsequently referred the matter to the Lafayette Parish District Attorney's Office for possible criminal proceedings against Dr. Odom. In so informing the District Attorney of Dr. Odom's actions, Dr. Thompson characterized the conduct of Dr. Odom as "highly unprofessional, repulsive, and debasing."

Approximately two months later, in February 1987, Dr. Thompson informed the parents of Christina, Dwayne and Teresa Arnaud, and the parents of Kendall, Mary

Tolliver and Paul Felix, of the experiments of Dr. Odom. Thereafter, in separate actions, the Arnauds and Tolliver and Felix filed the instant suits against Dr. Odom pursuant to 42 U.S.C. § 1983 seeking damages for the unauthorized medical experimentation by Dr. Odom on the corpses of their infant children. In addition to suing Dr. Odom, Tolliver and Felix also named as defendants in their action, Dr. Thompson and Lafayette Parish.

The section 1983 complaints of the Arnauds and Tolliver and Felix are in most respects similar but do differ slightly in the theory of recovery asserted in the complaints. In their complaint, the Arnauds assert a deprivation without procedural due process of a constitutional property or liberty interest in the body of their child after death created primarily by virtue of Louisiana state law. Similarly, Tolliver and Felix allege a deprivation of a constitutionally protected liberty or privacy interest in the body of their child after death; however, Tolliver and Felix maintain that such a liberty or privacy interest is created by the substantive parameters of the due process clause in the Constitution. Thus, Tolliver and Felix assert a deprivation of substantive, not procedural, due process. Nevertheless, the parents in both complaints are alleging constitutional deprivations of virtually the identical interest—that interest being the right to possess the body of one's next of kin in the same condition as death left that body, free from unwarranted state-occasioned mutilation. The parents are, however, asserting different sources of authority from which such an interest is derived.

Thereafter, the same district court presided over both of the instant cases and recognized that both actions, despite their differences regarding a theory of recovery, involved the same threshold issue of whether or not the parents enjoyed constitutionally protected interests in the

bodies of their deceased infants. Accordingly, the district court ordered briefing on the above constitutional issue. After considering the briefs of the parties on this issue, the district court, in separate orders, dismissed the claims of the Arnauds and Tolliver and Felix pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. In doing so, the district court concluded that the parents had failed to establish a constitutionally protected interest in the bodies of their dead infants. The Arnauds and Tolliver and Felix now appeal the orders of the district court. Because of the factual and legal similarity of the two appeals, we address both of them jointly in this opinion.

II. DISCUSSION

This Court has previously enunciated the necessary criteria which a plaintiff must set forth in a complaint to state a claim upon which relief may be granted under section 1983 as follows:

> To survive a motion to dismiss [pursuant to Rule 12(b)(6)], a pleading that raises a section 1983 claim must allege both that someone violated a right that the Constitution or laws of the United States secures and that the offender did so under color of state law.

Auster Oil & Gas, Inc., v. Stream, 764 F.2d 381, 386-87 (5th Cir.1985), *cert. dismissed*, — U.S. —, 108 S.Ct. 2007, 100 L.Ed.2d 237 (1988). "A district court should refrain from granting a motion to dismiss pursuant to Rule 12(b)(6) unless it appears, from a reading of the plaintiff's complaint, that the plaintiff has failed to set forth facts which,

if proven, would establish a violation of a constitutional right." *Sisk v. Levings,* 868 F.2d 159, 161 (5th Cir.1989). A plaintiff may not, however, plead merely conclusory allegations to successfully state a section 1983 claim, but must instead set forth specific facts which, if proven, would warrant the relief sought. *Id. See Elliott v. Perex,* 751 F.2d 1472, 1479 (5th Cir.1985).

Section 1983 provides a remedy for the deprivation of rights "secured by the Constitution and laws" of the United States by persons acting under color of state law. 42 U.S.C. § 1983. In both of the instant appeals, the parties do not contest the ruling of the district court that Dr. Odom was acting under color of state law in conducting the gruesome experiments on the bodies of Kendall and Christina. Rather, the threshold issue on appeal which this Court must resolve is whether the parents of Kendall and Christina have been deprived of a right secured by the Constitution laws of the United States within the context of section 1983. *Baker v. McCollan,* 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d433 (1979). *See Duncan v. Poythress,* 657 F.2d 691, 700 (5th Cir. 1981), *cert. dismissed,* 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982).

A. Procedural Due Process

As noted previously, the Arnauds contend that the actions of Dr. Odom, in performing the unauthorized experiment on the body of their infant daughter Christina during the autopsy procedure, constituted a deprivation without procedural due process of a constitutional property or liberty interest in the body of their child after death. Initially, it is noted that "property" rights protected by section 1983, such as those asserted by the Arnauds in the instant case, are not created by the Constitution, but are established and created by state law. *Cleveland Board of*

Education v. Laudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). "Liberty" interests, on the other hand, arise from two sources—state law and the Due Process Clause of the Constitution. *Hewitt v. Helms*, 459, U.S. 460, 466, 103 S.Ct. 864, 868, 74 L.Ed.2d 675 (1983).

[1] In the instant case, the Arnauds maintain that, by virtue of Louisiana statutory and case law, Louisiana has created in the next of kin of a deceased individual the following constitutionally protected property rights: "the right to possess the body in the same condition in which death left it; the right to control the disposition of the remains; and the right to enjoin disinterment of the deceased." In asserting possession of the above property rights, the Arnauds rely in part on La.Rev.Stat.Ann. § 8:655 (West 1986) which provides in pertinent part:

> the right to control the disposition of the remains of a deceased person, . . . vests in and devolves upon the following in the order named:
>
> . . . . .
>
> (3) The surviving parents of the decedent.[1]

---

[1] In its entirety, La.Rev.Stat.Ann. § 8:655 provides that:

§ 655. Right of disposing of remains

The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in and devolves upon the following in the order named:

(1) The surviving spouse, if not judicially separated from the decedent.

(2) The surviving children of the decedent;

(3) The surviving parents of the decedent;

(4) The surviving brothers and sisters of the decedent.

As a further source of their property interests, the Arnauds cite to Louisiana jurisprudence in this area which the Arnauds maintain recognizes a "quasi-property right in the nearest relative or next of kin of the deceased, said right being predicated on the universally recognized duty of relatives to bury their dead, which duty involves the right to possession and custody of the body for purposes of burial . . . in the same condition that existed at the moment life departed." *Blanchard v. Brawley,* 75 So. 2d 891, 893 (La.App. 1st Cir.1954). After considering the relevant Louisiana statutory and case law regarding the rights of next of kin in the body of a deceased relative, we conclude that Louisiana has indeed established a "quasi-property" right of survivors in the remains of their deceased relatives.

This Court, however, has previously recognized that federal constitutional due process concerns may be satisfied by existing state tort remedies where negligent, episodic deprivations of property rights by state officials occur. *Rutherford v. United States,* 702 F.2d 580, 583 (5th Cir.1983). *See Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct.

Footnote[1] continued. Further, La.Rev.Stat.Ann. § 8:659 provides in part:

> **§ 659. Permission to remove remains.**
>
> The remains of a deceased person may be removed from a cemetery space with the consent of the cemetery authority and the written consent of one of the following, in the order named, unless other directions have been given by the decedent:
>
> (1) The surviving spouse, if not judicially separated from the decedent;
>
> (2) The surviving children of the decedent;
>
> (3) The surviving parents of the decedent;
>
> (4) The surviving brothers and sisters of the decedent.

1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986). Even so, in *Rutherford,* this Court stated that:

> "[A] critical prerequisite to a determination under *Parratt* that existing post-deprivation remedies are sufficient to satisfy the requirements of due process is an ascertainment of congruity between the substantive interests asserted by the plaintiff and the interest protected by the existing remedial scheme. Remedies not responsive to the range of intangible interests claimed to be injured are not meaningful in an analysis of the adequacy of process provided."

Rutherford, 702 F.2d at 583. The *Rutherford* Court, concluded that, where a federal tax agent harassed taxpayers in assessing their taxes, the plaintiff taxpayers were asserting a deprivation of a substantive liberty interest which could not be adequately remedied by statutory procedures provided by the government for obtaining a tax refund. Specifically, the refund procedures did not allow recovery by the taxpayers for their mental anguish and legal fees as a result of the agent's abusive activities.

[2] Thus, in the instant case, having recognized the existence of a "quasi-property" right possessed by the Arnauds in the body of their infant daughter Christina by virtue of state law, our inquiry now becomes whether the state post-deprivation tort claims adequately remedy the essential aspects of the property interests alleged by the Arnauds to have been deprived by the actions of Dr. Odom in the instant appeal.

Utilizing an analysis similar to that outlined above, the Eighth Circuit, in *Fuller v. Marx,* 724 F.2d 717 (8th Cir.1984) addressed the adequacy of state pro-

cedures to satisfy due process concerns on facts which bear some resemblance to those of the instant case. In *Fuller,* the plaintiff, a widow, relying on a "quasi-property" right in her dead husband's body created by virtue of Arkansas case law, asserted a section 1983 action for deprivation of that property right where the coroner failed to return to her all of the body organs of her dead husband following an autopsy. The *Fuller* court, recognizing the "quasi-property" right of the widow in the body of her dead husband, nevertheless declined to find a constitutional invasion of that right occasioned by the state's removal of certain organs from the body of the widow's dead husband during the autopsy. *Fuller,* 724 F.2d at 719. The court in *Fuller* determined that "[a]ny quasi-property rights [the widow] had in her husband's internal organs, if protected by [an] Arkansas statute" which allowed the widow to request the return of her husband's organs after the autopsy. *Id.*

Similar to the process available to the widow in *Fuller,* but unlike the process afforded the taxpayers in *Rutherford,* the postdeprivation process available to the movants (the Arnauds in the instant case) is responsive to the wrongs asserted in their complaint. In particular, Louisiana, by statute, allows actions to seek recovery for intentional torts. La.Civ.Code Ann.art. 2315 (West 1989). Further, Louisiana case law provides a cause of action to recover damages for the unauthorized tampering of a corpse. *French v. Oschner Clinic,* 200 S.2d 371 (La.App. 4th Cir.1967). At oral argument, counsel for the Arnauds stated that such state law claims have, in fact, been initiated against Dr. Odom. Presumably, the above state remedies will adequately redress the Arnauds for any injuries which they suffered as a result of the experiments by Dr. Odom on the body of their daughter.

[3] Thus, since adequate state postdeprivation pro-

cess is available to remedy the injuries asserted by the Arnauds in their complaint against Dr. Odom, we must conclude that the Arnauds have not suffered a constitutional invasion of any property right pursuant to section 1983. Moreover, because the Arnauds are asserting a deprivation of procedural due process, the above conclusion regarding the adequacy of state postdeprivation remedies is equally applicable to any alleged constitutional deprivation of a liberty interest possessed by the Arnauds in the body of their daughter. In reaching this conclusion, we note that our decision is consistent with the admonition of the Supreme Court that federal courts should refrain from "federalizing" the law of torts by making of "the Fourteenth Amendment a font of tort law to be super-imposed upon whatever systems may already be administered by the States" by "turning every alleged injury which may have been inflicted by a official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Paul v. Davis,* 424 U.S. 693, 701, 96 S.Ct. 1155, 1161 47 L.Ed.wd 405 (1976); *Parratt,* 451 U.S. at 544, 101 S.Ct. at 1917.

B. Substantive Due Process

In contrast to the theory of recovery asserted by the Arnauds in their section 1983 complaint, Kendall's parents, Tolliver and Felix, maintain that the actions of Dr. Odom in performing the experiment on the corpse of Kendall deprived them, not of a property interest without procedural due process, but of a liberty or privacy interest derived from the substantive parameters of the due process clause itself. In rejecting the claim of a substantive due process violation in its order of dismissal, the district court in the instant case stated that "[t]his court has found no precedent directing the court to expand the already existing parameters of the substantive content of the due process clause of the fourteenth amendment to the United

States Constitution." We likewise can discern no precedent in the relevant jurisprudence which would warrant such an extension of the liberty or privacy rights derived from and protected by the Due Process Clause in the Constitution. Thus, we reject the contention of Tolliver and Felix in this regard.

[4] As an initial matter, however, we recognize that the availability of state postdeprivation tort claims to Tolliver and Felix to remedy the injuries asserted by Tolliver and Felix in their complaint are not relevant to the instant substantive due process inquiry. This Circuit has confined the *Parratt* analysis employed in the previous portion of this opinion regarding the availability of state remedies to satisfy the constitutional concerns of due process to asserted violations of *procedural, not substantive, due process. Thibodeaux v. Bordelon*, 740 F.2d 329, 333 (5th Cir. 1984). In this regard, this Court has declined to extend the *Parratt* rationale to "substantive constitutional proscriptions applicable to the states because of incorporation into the due process clause of the fourteenth amendment." *Id.* In the instant appeal, Tolliver and Felix are asserting a deprivation of a constitutional liberty or privacy interest in the body of their infant son derived from the enumerated rights secured by the Constitution; therefore, the availability of state postdeprivation remedies is irrelevant to an inquiry into whether the actions of Dr. Odom violated such substantive rights provided by the Constitution.

[5] Thus, our focus now becomes whether, from the express rights enumerated in the Constitution, a liberty or privacy interest devolves upon an individual to be free from state-occasioned mutilation to the body of a deceased relative. We are persuaded that, despite the egregious wrong suffered by the parents at the hands of Dr. Odom in

the instant case, no such liberty or privacy interest is created by the Constitution. This Court has previously stated that "[i]mplication of nontextual substantive rights from the general monitions of the due process clause is a matter not to be undertaken lightly, but only with the caution of seasoned and mature thought." *Rutherford*, 702 F.2d at 584. Due to the sujectivity inherent in any inquiry by the judiciary in this area, the definition of the substantive content of the due process clause is a task to be undertaken with great caution; it is here that judges encounter the risk of transforming their seasoned and mature thought into their own personal discernment.

In recognition of these risks, courts have refrained from creating from the substantive parameters of the due process clause a large number of liberty interests. In this regard, the Supreme Court has concluded that the due process clause protects against state transgression only those personal immunities that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). *See Sotto v. Wainwright*, 601 F.2d 184, 191 (5th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980). In *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Supreme Court defined those "liberty" interests protected by the due process clause as follows:

> While this court has not attempted to define with exactness the liberty thus guaranteed [Fourteenth Amendment guarantee against deprivation of life, liberty, or property without due process of law], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life,

> to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399, 43 S.Ct. at 626. Such liberty interests implicit within the substantive parameters of the due process clause include the right of an extended family to share a household, *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); the right of a woman to decide whether to have an abortion, *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); the freedom to marry a person of another race, *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the right to vote, *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); the right to use contraceptives, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); the right of access to the courts, *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); the right of association, *NAACP v Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); the right to send children to private schools, *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); and the right to have children instructed in foreign language, *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

[6,7] Mindful of the fact that courts have infrequently recognized liberty interests derived from the substantive content of the due process clause, we decline to accept the invitation of Tolliver and Felix to embrace a new liberty interest in the instant case. As intimate as the right is of next of kin to possess the body of a loved one in the same condition as the body was at death, we are unable to extend over

that right the constitutional umbrella of substantive due process on the facts of the instant case.[2] In this regard, it is observed that, by creating a quasi-property right of survivors in the body of a deceased relative and providing state tort claims to protect that right, the State of Louisiana has recognized the intimacy and sanctity of that right.

As a final matter, we note that the district court, in dismissing the complaints of the Arnauds and Tolliver and Felix, failed to specify in its orders of dismissal that any pendent state law claims are to be dismissed without prejudice. For the purpose of ensuring that the Arnauds and Tolliver and Felix encounter no hurdles of claim preclusion in their state claims arising from Dr. Odom's actions, we accordingly modify the district court's order of dismissal of any pendent state law claims possessed by the Arnauds and Tolliver and Felix to be without prejudice. For these reasons, the district court's orders of dismissal in favor of Dr. Odom, Dr. Robert Thompson, and Lafayette Parish are

AFFIRMED AND MODIFIED.

---

[2] In a similar fashion, we are constrained to reject the contention of Tolliver and Felix that they have been deprived of a first amendment right to bury Kendall in a manner consistent with their religious beliefs by the actions of Dr. Odom. We also reject the assertion of Tolliver and Felix that they were unconstitutionally denied access to the courts as a result of an alleged conspiracy between Lafayette Parish coroner officials to conceal the actions of Dr. Odom. On the contrary, the record reveals that Dr. Thompson did everything possible to punish Dr. Odom, including initiating criminal proceedings.

APPENDIX C

UNITED DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE - OPELOUSAS DIVISION

FILED
DEC 11 1987

MARY ANN TOLLIVER and
PAUL FELIX

VS. CIVIL ACTION NUMBER 87-2203

DR. CHARLES B. ODOM, JR.,
ET AL SECTION O - JUDGE SHAW

RULING

Now before the court is the motion of the Parish of Lafayette ("Lafayette Parish") to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted. Lafayette Parish argues that it is not a proper party defendant in this proceeding, as it is neither liable nor answerable to plaintiffs for the activities of Dr. Odom.

On October 5, 1987, plaintiffs Mary Ann Tolliver and Paul Felix brought this action pursuant to 42 U.S.C. §1983, alleging that on October 18, 1986, their minor child died. Dr. Odom, individually and in his capacity as Deputy Coroner, performed an autopsy, mandated by state law, to determine the cause of the death. Plaintiffs further allege that prior to performing the autopsy, while in possession of their child's body and acting under state law, Dr. Odom performed unauthorized and outrageous experiments upon

the child's body, by dropping the child head first from a pre-determined height onto a concrete surface, resulting in disfigurement to the child's skull. Plaintiffs allege that the fourteenth amendment of the United States Constitution guarantees them a right to be free from state-occasioned damage to the bodily integrity of their minor child, and that defendants have deprived plaintiffs of their liberty to decide the mode and the manner of caring for the bodily remains of their minor child. Plaintiffs further allege that Lafayette Parish and Dr. Robert B. Thompson as Coroner, willfully and intentionally failed to properly select a competent person to serve in the capacity of Deputy Coroner, and willfully and intentionally failed to prudently train, supervise and/or monitor the activities of Dr. Odom in the proper conduct of statutorially mandated autopsies and reporting procedures. Finally, plaintiffs assert that the conduct of defendants Dr. Odom, Dr. Thompson, and Lafayette Parish was done pursuant to and in accordance with the policy, practice, and custom of defendants.

In its motion to dismiss, the Parish of Lafayette asserts that it is neither liable nor answerable to plaintiffs for Dr. Odom's conduct. In support of its motion, Lafayette Parish contends that the office of coroner is a state agency, since it has been created by the Louisiana State Constitution. Moreover, Lafayette Parish asserts, the office of Coroner operates independently of the parish governing authority, even though the parish governing authority appoints an interim coroner in the event that the office of the coroner in the parish is vacant, and even though the parish may be responsible or paying all necessary or unavoidable expenses incurred by the coroner's office. *Mullins v. State,* 387 S. 2d 1151 (La. 1980).

The court cannot agree with the reasoning of Lafayette Parish. The Louisiana State Legislature has legislatively overruled *Mullins v. State,* 387 So.2d at 1151,

by adopting LSA-R.S. 42:1441.4(2), which states that the parish for whom the coroner provides services and which exercises primary day-to-day control over the functions of the coroner should be answerable for the torts of employees which were committed in the exercise of functions for that locality.

The first issue the court must address under 42 U.S.C. § 1983 is whether or not Dr. Odom was acting under color of state law when he performed the experiments on plaintiffs' child. In order to act under color of state law, Dr. Odom must have acted by virtue of the authority conferred by state law, regardless of whether he lawfully followed state law. That is, Dr. Odom can be said to have acted under state law only if he was exercising some real power given to him by state law, or if he was pretending to act in the performance of his official duty. *See Monroe v. Pape*, 365 U.S. 167 (1961). If Dr. Odom can be considered to be a private party with some governmental involvement, then state action would exist (1) where the state and Dr. Odom maintained a sufficiently interdependent or symbiotic relationship; (2) where the state required, encouraged, or otherwise was significantly involved in nominally private conduct; and (3) where Dr. Odom exercised a traditional state function. *Marsh v. Alabama*, 326 U.S. 501 (1946).

The record is devoid of evidence indicating whether or not Dr. Odom was acting under state law when he performed the experiments upon plaintiffs' child. The record does not reveal the purpose of Dr. Odom's experiments, and whether or not he was acting in his official capacity when he performed them. Moreover, the record does not reveal the dynamics of the relationship between Dr. Odom and the state of Louisiana, except to the extent that the office of coroner is a state agency. Nevertheless, plaintiffs' claim must be dismissed because the rights of which plain-

tiffs have been allegedly deprived are not rights which are secured by the fourteenth amendment to the United States Constitution. Plaintiffs appear to be asserting a property right in their child's body to keep the body free from mutilation and to have the body returned to them in the same condition as it was when the body left them. In his treatise on the law of torts, Professor William L. Prosser states that in cases involving the mishandling of dead bodies, the "property" right involved is in reality a protection of the survivors' feelings:

> Finally, there are a great many cases involving the mishandling of dead bodies, whether by mutilation, disinterment, interference with proper burial or other forms of intentional disturbance. In most of these cases the courts have talked of a somewhat dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer. . . . [T]he tort is in reality merely the intentional infliction of mental distress.

Prosser, *Law of Torts* (3d Ed. 1971) at 58. *See Eastin v. French*, 200 So.2d 371 (La.Ct.App. 4th Cir. 1967) (unauthorized autopsy which allegedly did not mutilate the body or interfere with burial services did not preclude recovery for damages for unauthorized autopsy, where widow did not receive body of husband in same condition as it was at the time of the husband's death).

The court is aware of no federally protected constitutional property right of a next of kin in a dead body. Moreover, even if the right to have a dead body free from mutilation could be characterized as a right of liberty, rather than a property right, no court has upheld this right under the United States Constitution. The most dispositive case the court has uncovered is the United Sttes Court of Appeals for the Eighth Circuit's opinion in *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984). In *Fuller*, a widow brought an action against a medical examiner and his insurer, alleging, among other things, that the examiner had disposed of the husband's bodily organs in violation of the widow's constitutional rights. More specifically, the widow asserted that the failure of the medical examiner to return the husband's organs to the dead body after his autopsy constituted an unconstitutional invasion of her property right in her husband's dead body. The Eighth Circuit affirmed the district court's holding that the widow had no constitutionally protected interest in her husband's dead body. The court reasoned that any quasi-property rights the widow had in her husband's internal organs, if protected by the United States Constitution, were also protected by an Arkansas statute which stated that the widow could have taken possession of her husband's organs if she had made a written request. Because the widow had not complied with the state statute, the Eighth Circuit found no unconstitutional invasion of a property right.

This court has found no precedent directing the court to expand the already existing parameters of the substantive content of the due process clause of the fourteenth amendment to the United States Constitution. Therefore, the court hesitates to expand the due process clause to include a property right in a dead body. "Implication of nontextual substantive rights from the general monitions of the due process clause is a matter not to be undertaken

lightly, but only with the caution of seasoned and mature thought." *Rutherford v. United States,* 702 F.2d 580 (5th Cir. 1983). Although plaintiffs have indeed suffered a grievous wrong, allegations of tortious conduct are insufficient to sustain a section 1983 violation. The wrong must be of a federally protected right. *Baker v. McCollan,* 443 U.S. 137, 146, 99 S. Ct. 2689, 2695, 61 L.Ed. 2d 433 (1979). This court also finds it difficult to include a next of kin's property right in a dead body within the liberty rights enumerated in *Meyer v. Nebraska,* 262 U.S. 390 (1923), where Mr. Justice McReynolds, in an opinion holding invalid a Nebraska statute forbidding the teaching of any subject in any language but English in any private, parochial, or public school, defined the word "liberty" protected by the due process clause as follows:

> While this court has not attempted to define with exactness the liberty thus guaranteed [Fourteenth Amendment guarantee against deprivation of life, liberty, or property without due process of law], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire a home and bring up children, *to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen.*

262 U.S. at 399 (emphasis added).

Plaintiff's property right in their child's body is clearly not encompassed in the panorama of liberty rights described by Justice McReynolds. The most analogous

liberty right of which the court can conceive is perhaps a first amendment right of a next of kin to bury the dead in a manner consistent with the next of kin's religious beliefs. This right can perhaps be derived from the right of one to worship God according to the dictates of one's conscience or the right to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons. Nevertheless, the right of a next of kin to bury the dead in a manner consistent with his or her religious beliefs is not a federally protected interest. In *Fuller v. Marx,* 724 F.2d at 720, the Eighth Circuit refused to classify the right of a next of kin to bury the dead in a Christian burial as a right of constitutional magnitude. In *Fuller,* Arkansas law required physicians to safely dispose of bodily organs after autopsies. The Eighth Circuit ruled that this statute did not hinder the plaintiff in the free exercise of her religious beliefs. Given the dearth of precedent expanding the first amendment to include a next of kin's right to buy the dead in accordance with his or her religious beliefs, the court hesitates to make such an expansion.

Because the court has determined that plaintifs' property right in their child's body does not rise to the level of a constitutional violation, the court need not address the issue of whether a procedural or a substantive "conscience shocking" violation of that right has occurred. Accordingly, the motion by the Parish of Lafayette to dismiss plaintiffs' claims for failure to state a claim upon which relief may be granted is hereby GRANTED.

Opelousas, Louisiana, December ____. 1987.

/s/ John M. Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
DEC 11 1987

MARY ANN TOLLIVER and
PAUL FELIX

VS CIVIL ACTION NUMBER 87-2203

DR. CHARLES B. ODOM, JR.,
ET AL SECTION 0 - JUDGE SHAW

JUDGMENT

This action came on for hearing before the court, District Judge John M. Shaw presiding, and the issues having been duly heard and a decision having been duly rendered.

It is ORDERED, ADJUDGED AND DECREED that the motion of defendant Lafayette Parish to dismiss the claims of Mary Ann Tolliver and Paul Felix without prejudice is hereby GRANTED.

Opelousas, Louisiana, December ____, 1987.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: 12/16/87

REPLY TO ATTN OF: United States District Judge John M. Shaw, W.D.La., Lafayette-Opelousas Div., Sec. O

SUBJECT: Mary Ann Tolliver v. Charles B. Odom, Jr. 87-2203-0

FILED

TO: All Counsel of Record

Dec 16 1987

MINUTE ENTRY

The court's ruling and judgement of December 11, 1987, wherein the court granted the motion of the Parish of Lafayette to dismiss, is hereby VACATED. All parties have ten days upon receipt of this notice to file with the court a memorandum on the issue of whether or not the facts of this case present a constutionally protected interest.

COPY SENT
DATE 12-16-87
BY CB
TO: STEVENS PETRE, Jr.
JAN KOWER SHELTON

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
JAN 06 1988

MARY ANN TOLLIVER, ET AL

VS. CIVIL ACTION NUMBER 87-2203

DR. CHARLES B. ODOM, JR.,
ET AL SECTION O - JUDGE SHAW

RULING

Now before the court is the motion of the Parish of Lafayette to dismiss plaintiffs; complaint. For the reasons assigned in the court's ruling of December 11, 1987, the court hereby reinstates the ruling of that date, and the Parish of Lafayette's motion to dismiss is therefore granted.

The court also notes that Dr. Odom was acting under color of state law, pursuant to 42 U.S.C. § 1983, when he performed the experiments upon plaintiffs' child's body. Had Dr. Odom not been the Assistant Coroner of Lafayette Parish, he would not have been in a position to have possession of plaintiffs' child's body or to have performed experiments upon the child's body. Dr. Odom's "cloak of authority," conferred by the State, gave him the opportunity to perform experiments upon plaintiffs' child's body.

Accordingly, the court's ruling of December 11, 1987, is hereby reinstated, the motion of the Parish of

Lafayette to dismiss the complaint of Mary Ann Tolliver and Paul Felix is hereby GRANTED, and the case is DISMISSED with prejudice at plaintiff's cost.

Opelousas, Louisiana, January 5, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 1-6-88
BY FM
TO: Stevens Petre
McNamara
Jan Kower Shelton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
JAN 06 1988

MARY ANN TOLLIVER, ET AL

VS. CIVIL ACTION NUMBER 87-2203

DR. CHARLES B. ODOM, JR.,
ET AL SECTION 0 - JUDGE SHAW

JUDGMENT

This motion came on for hearing before the court, District Judge John M. Shaw presiding, and the issues having been duly heard and a decision having been duly rendered,

It is hereby ORDERED, ADJUDGED, AND DECREED that the court's ruling of December 11, 1987, is hereby REINSTATED, the motion of the Parish of Lafayette to dismiss the complaint of Mary Ann Toliver and Paul Felix is hereby GRANTED, and this case is hereby DISMISSED with prejudice, at plaintiffs' cost.

Opelousas, Louisiana, January 5, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment entered 1-6-88

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
Jan 06 1988

MARY ANN TOLLIVER, ET AL

VS. CIVIL ACTION NUMBER

DR. CHARLES B. ODOM, JR.,
ET AL SECTION O - JUDGE SHAW

RULING

Now before the court is the motion of Dr. Charles B. Odom, Jr. to dismiss plaintiffs' complaint. On December 11, 1987, this court granted the motion of the Parish of Lafayette, another defendant in this case, to dismiss plaintiffs' complaint. The court later vacated this ruling, in order to allow the parties to further brief the constitutional issue, but the court reinstated the ruling on January 5, 1988. For the reasons assigned in the court's ruling of December 11, 1987, the court grants Dr. Odom's motion to dismiss.

Accordingly, the motion of Dr. Charles B. Odom, Jr. to dismiss the complaint of Mary Ann Tolliver and Paul Felix is hereby GRANTED, and this case is dismissed with prejudice at plaintiffs'cost.

Opelousas, Louisiana, January 5, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

F I L E D
JAN 06 1988

MARY ANN TOLLIVER, ET AL

VS. CIVIL ACTION NUMBER 87-2203

DR. CHARLES B. ODOM, JR.,
ET AL SECTION O - JUDGE SHAW

J U D G M E N T

This motion came on for hearing before the court, District Judge John M. Shaw presiding, and the issues having been duly heard and a decision having been duly rendered,

It is hereby ORDERED, ADJUDGED, AND DECREED that the motion of Dr. Charles B. Odom, Jr. to dismiss the complaint of plaintiffs Mary Ann Tolliver and Paul Felix is hereby GRANTED, and this case is hereby dismissed with prejudice, at plaintiffs' cost.

Opelousas, Louisiana, January 5, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment entered 1-6-88

APPENDIX G

LAFAYETTE PARISH FORENSIC LABORATORY
1006 BERTRAND DRIVE - LAFAYETTE, LA 70506
(318) 232-5646

ROBERT B. THOMPSON, M.D.
CORONER/DIRECTOR

FORENSIC PATHOLOGIST
JOHN C. JACOBSON
CHIEF INVESTIGATOR

February 24, 1987

Hon. Nathan Stansbury
District Attorney
15th Judicial District of Louisiana
Courthouse
Lafayette, LA 70502

Dear Mr. Stansbury:

The following is a description of certain happenings in the Lafayette Parish Forensic Laboratory in the months of October and December, 1986, which information I submit to you with the hope that you will see fit to file criminal charges against Charles B. Odom, M.D., for his activities in these events, under La. R.S. 8:654.

The forensic laboratory was established for the sole purpose of determining cause of death when deemed necessary by the Coroner of Lafayette Parish, who is ex-officio director of the forensic laboratory. The lab has, for almost two years, contracted with the L.S.U. School of Medicine for the services of a certified forensic pathologist to perform these autopsies. Dr. Charles B. Odom was employed by L.S.U. and assigned to serve my office in furnishing those services since the inception of the contract arrangement.

Dr. Odom has at no time been an employee of Lafayette Parish, nor has he, to my knowledge, ever been compensated directly by that parish for services rendered.

On October 18, 1986, Dr. Odom was asked to perform an autopsy on an infant, two months of age (our file No. 86-103), an apparent victim of Sudden Infant Death Syndrome ("crib death"). Prior to performing the autopsy, Dr. Odom had x-ray pictures taken of the baby's skull, then took the body out of doors to a concrete floor, held the body by the feet so that the dependent head was one meter from the floor, and dropped the body head first to the concrete floor. Then more x-rays were taken, presumable to determine the extent of skull and/or brain damage from the fall. A copy of his dictated report is enclosed.

On December 22, an autopsy was ordered on a four month old apparent victim of S.I.D.S., our case No. 86-132, and again, prior to performing autopsy, Dr. Odom repeated the same procedure of x-rays, dropping the infant body one meter, head first, to the concrete driveway, followed by more x-rays. A copy of his dictated report is attached.

My first knowledge of these incidents came at 4:00 p.m. December 26, 1986, when John Jacobson, Chief Forensic Investigator, came to my residence to apprise me of the experiments. Within the hour of my receiving the information, Dr. Odom was advised by written notice, hand-delivered by a Lafayette Parish Deputy Sheriff, that he was suspended from performance of any autopsies in the forensic laboratory.

On January 5, 1987, Dr. Odom was directed to vacate the laboratory premises and not to enter the premises without my specific authorization. L.S.U. School of Medicine was advised of my actions re: Dr. Odom on that date, with a

request
that L.S.U. arrange to meet my needs by furnishing other qualified pathologists.

Dr. Odom's experiments were performed without my knowledge or consent, nor with the consent of the parents. They can in no way be explained as a part of an autopsy, but rather, detract from the integrity of a legitimate post-mortem examination. In the autopsy reports submitted to me by Dr. Odom, there is no mention of the experiments. On the contrary, Dr. Odom's transcripts of the experiments were secreted in office files not intended for my eyes.

I consider these performances highly unprofessional, repulsive, and debasing to a very valuable and productive field of the practice of medicine. Furthermore, there is no doubt in my mind that these constitute mutilation of human remains, and hence a violation of the law. I sincerely hope that you will see fit to prosecute to the fullest extent of the law.

Thank you.

Yours truly,

/s/ R.B. Thompson, M.D.
Robert B. Thompson, M.D.
Lafayette Parish Coroner

RBT/lo

APPENDIX H

Q Would you describe the research procedure that did you on that body?

A. Yes. I was endeavoring to understand the effects of a fall of approximately three to four feet, as to whether it would produce a skull fracture or not. I intentionally held the child with its skull at a height of one meter —

MR. MCNAMARA:

You mean the corpse.

THE WITNESS:

Yes, the corpse of this child, at the height of one meter, and let gravity provide the force. The head struck the surface, a concrete surface. I then completed the remainder of the autopsy to determine whether there were any injuries involved.

EXAMINATION BY MR. SIMON:

Q And were there any injuries involved?

A. There was a skull fracture.

Q Can you describe the skull fracture?

A You're the first one.

Q Do you know the dynamics of a one pound difference?

A Do I personally know it?

Q Yes.

A I know the physics formula, but I haven't worked it out. There may be significant differences.

Q And since you perceived that there may be significant differences, you never then applied yourself to exacting the weight duplication?

A No.

Q All right. Now, then, in November you feel that now you must perform this research procedure by dropping the body of a young child of comparable age to a concrete floor, head first?

A You said must perform. I saw it as a desirable thing to do.

Q Whose desire?

A Mine.

---

as far as you were concerned, was a procedure and policy that would fall within the procedure and policy of the State of Louisiana in your function as a forensic pathologist; is that correct?

A I believe that the law gave me that authority; that is correct.

Q And that's what you understood to be the practice and procedure of the State of Louisiana?

A I never thought of it in such grandiose terms as State of Louisiana. But I believe that the law of the State of Louisiana gave me authority to conduct these studies, yes, sir.

Q So, while you didn't relate the specific procedure that you pursued, generally, a procedure that falls within your overall judgment of the case under consideration is included within the authority of the state and the practice and procedure of the state; is that it?

---

seek it.

Q In other words, you're saying then as far as you understand, and as far as the procedure of the state or the policy of the state, is you do not have to get consent of parents, for example, to perform any experiment on any child of that marriage?

MR. MCNAMARA:

Wait, now —

THE WITNESS:

We're talking about a corpse now, and the state law mandated that I do an autopsy, number one. The state law also said that I could do whatever studies were necessary in order to gather data, information, for presentation to a court of law or to a grand injury.

I presume that that was permission enough. The state law ordered me to do an autopsy and also gave me the authority to do whatever studies were